EU Accession to the ECHR: What to Do Next

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Some weeks have passed since the European Court of Justice delivered its startling binding Opinion 2/13 against the accession of the European Union to the European Convention on Human Rights (ECHR). There has already been much academic commentary on the complex Opinion. The European Commission has declared the need for a period of reflection. Mindful of its legal duty under Article 6(2) TEU to achieve the EU's accession to the Convention, the Commission considers itself still empowered by the Council decision of June 2010 to continue negotiations in due course with the Council of Europe. But the political reaction is muted: some EU member states would like to knock the matter into the long grass; and the European Parliament has not yet found its voice. In truth, nobody can relish the thought of re-opening negotiations at this juncture on the Draft Accession Agreement (DAA) with either Russia or Turkey, both of whose leaders appear to have abandoned the democratic rule of law and turned against Western values.

Yet the Court of Justice (CJEU) raises important issues which the other institutions cannot simply ignore. Its Opinion adds to the already fairly improbable conditions which the Treaties themselves attach to the EU's accession to the ECHR: Protocol No 8 says that accession shall not affect the 'specific characteristics of the Union and Union law', that the competences of the EU and the powers of its institutions shall be preserved, that the situation of member states vis-à-vis the ECHR should not be changed, and further, that no intra-EU dispute should go to the European Court of Human Rights (ECtHR). Article 52 of the Charter says that where its provisions correspond to the ECHR their 'meaning and scope … shall be the same'; while Article 53 denies that the Charter restricts or adversely affects rights 'as recognised, in their respective fields of application, by Union law and international law' – notably the ECHR. Whereas Articles 53 (coincidentally) of both the ECHR and the Charter allow their signatories to offer more extensive protection than the Convention, the CJEU has been anxious to insist that after accession the EU member states should not seek to outpace or undermine the 'primacy, unity and effectiveness' of Union law.

Read it again

So what should be done? After first reactions have passed, one should read the Opinion again, and from a number of different angles. Although there may be some limited room for manoeuvre in tweaking the DAA on marginal issues, accession will remain blocked until something substantive happens. The Opinion is the latest manifestation of the historic tension in post-war Europe between federal and international law. This is important unfinished business. Nobody can be complacent about the opening up of a gap between the human rights regime of the Council of

Europe and the fundamental rights regime of the European Union. A fall-out between the ECtHR at Strasbourg and the CJEU at Luxembourg is a bad thing for European rights protection.

And it comes at a difficult time. There is already a constitutional furore between nationalists and federalists about the state-like qualities of the EU – and, more pertinently, about how much more state-like the EU should become. The Opinion comes at the very start of the next phase of the EU's constitutional development, challenging the outcome of both the Convention on the Charter of Fundamental Rights (1999-2000) and the Convention on the Future of Europe (2002-03). Those of us involved in those Conventions recall very clearly how the decision to accede to the ECHR became the *quid pro quo* for making the Charter binding: failure to complete the process will inevitably weaken the force of the Charter.

So while it goes reflecting, the Commission would do well to remind everyone of the original purpose of accession to the Convention, which is to permit the European Union to develop superior rights jurisprudence of a constitutional type. Closing the circle between the Convention and Charter systems should allow the EU to achieve the best global standard in rights protection and remedial action. That is the name of the game.

The need for internal rules

One of the odd things about this story so far is that the EU executive has yet to agree its internal rules for managing affairs after accession. The main problem is that the usual suspects in the Council are resisting the aggrandisement (as they see it) of the role of the European Commission in the Council of Europe's Committee of Ministers. Federalists (of whom I am one) are concerned lest the Community method is undermined in this relatively novel strategic field of European integration. Much rests on the quality and clarity of these internal rules. Both the European Parliament, which has to give its consent to the terms of the accession (Article 218(6) TFEU), and the CJEU, which will surely have to be asked for a second Opinion on a revised package deal (Article 218(11)), would be enlightened by the publication of agreed internal rules.

For example, could the internal rules help to settle the thorny matter of the ECHR's new Protocol 16? This yet-to-be-ratified Protocol would allow its signatory states to refer to the ECtHR for advice. Understandably, the CJEU is worried that this avenue will be used by errant EU states to second-guess its own due process of preliminary rulings under Article 267 TFEU. A good internal rule would discourage member states from indulging in Protocol 16.

Another internal rule could pre-empt as far as possible interference by the ECtHR from choosing co-respondents in a case brought before it by a non-EU state or another entity on a matter leaning on EU law. It can be well understood that the CJEU, while accepting the ECtHR as its external supervisor, should wish to prevent its own subordination to the ECtHR. Such an assertion of its own powers within the context of the EU's conferred competences would strengthen the CJEU in its polite

but determined struggle for supremacy over the national constitutional courts of EU member states.

The general rule should be established that EU states go in the first instance to Luxembourg about the Convention and should never go to Strasbourg about the Charter. In all circumstances, to maintain the autonomy of the EU's legal order, the prior involvement of the CJEU should be guaranteed. Advocate General Kokott recommended that the EU states make a self-denying ordinance against using Article 33 ECHR to settle their disputes, but instead stick to EU arbitration (as Article 344 TFEU requires).

However, it will be worth examining the possibility of bolstering such a unilateral declaration and the new rules of procedure in the form of a regulation under Article 352 TFEU.

The inevitability of treaty change

For the politicians among us (of whom I am one) the additional question arises of whether the Treaties can be amended in order to lower the numerous hurdles that have to be jumped before accession to the ECHR can be realised. The prospect of treaty change is not shocking: come accession, the horizontal articles of the Charter and Protocol No 8 will have to be modified or suppressed in any case. And treaty change for other reasons – notably fiscal union – is just around the corner regardless.

One element which aggravates us politicians is the doctrine of 'mutual trust' which the CJEU insists prevails and must prevail between member states on the matter of rights. Such a doctrinal approach seems increasingly out of kilter with political reality, especially on asylum and immigration issues where there is plenty of evidence of systemic deficiencies in many member states. The growing constitutional interdependence of EU states is apparent in several fields. This mutual reliance deserves to be underpinned in the EU treaty with a new clause that obliges the EU states, especially when they change their domestic constitutions, to respect the norms of the European Union. Such a provision would fall naturally within Article 4 TEU where the EU is already obliged to respect the domestic constitutions of its states: that compliment now needs to be returned.

Equally, in order to make the concept of EU citizenship more real and to reinforce freedom of movement, an enhancement of Articles 20-23 TFEU would seem a reasonable proposition at a time when the Commission and the legislators seem to be ready to extend 'mutual trust' wider from the civil law into the criminal law field.

Lastly, there is the enormous difficulty presented by the fact that Articles 24(1) TEU and 275 TFEU severely restrict the powers of the CJEU to oversee the common foreign and security policy of the Union. The CJEU quite understandably warns of the risk that after accession the ECtHR would be able to trump EU law in this area while only member states and not the CJEU itself would be able to intervene at Strasbourg. Such a lacuna in the current EU Treaties matters very much because

breaches of human and fundamental rights are likely to emerge precisely in the context of the external activities of the EU, including common security and defence policy missions, as well as over the EU's dealings with third country nationals. We knew this to be the case in the Convention: it is surely now time to rectify the earlier mistake.

Conclusions

In summary, read Opinion 2/13 again. It deals with matters which go to the heart of present battles between nationalism and federalism. There is no room for apathy because a failure by the EU to accede to the ECHR would weaken rights protection in Europe and elsewhere. The European Commission should remind us of this.

It is not opportune to renegotiate the DAA from scratch. Instead, the Commission, backed more vigorously by the European Parliament, should press the Council to settle their tedious arguments over the EU's internal rules. Such rules should include procedures to protect the autonomy of EU law and the prerogatives of the Court of Justice in respect of preliminary rulings, prior involvement and co-respondency. Secondary legislation to codify these procedures should be considered.

The resolution of the issues raised in Opinion 2/13 should be used to strengthen the case for an early revision of the Treaties. Added to the agenda of the EU's third Convention should be the clarification of the doctrine of mutual trust, the strengthening of the constitutional identity of the Union, the consolidation of citizens' rights with regard to freedom of movement, and the widening of the jurisdiction of the Court of Justice in the fields of foreign policy, security and defence.

And the judges of Luxembourg and Strasbourg should get to meet up more often.
